> The value of the cable package to any particular viewer may be reduced considerably if the services that he or she values are removed to make room for leased access programmers. Any resulting canceled subscriptions, in turn, reduce the implicit fee that other program services are willing to pay for access to the system. Thus, the indirect value to the operator of carrying the service may be substantial, although difficult to quantify. Put another way, the contributions of a service to the economic success of the operator are unlikely to be taken into account completely through the revenues apparently generated by that service alone.[31]

As Besen and Murdoch also point out, the Commission's opportunity cost formula could result in migration of existing programming services to leased access. This result would be most likely to occur in the case of premium services and home shopping services, because the leased access charges that would be paid by such services would be substantially below what they presently pay to the cable operator.[32] Consequently, "the savings for the migrating service [would] translate into revenue losses, without a commensurate cost reduction, for the cable system operator."[33]

The above analysis makes clear that the Commission's opportunity cost formula is fundamentally flawed in that it omits the most important "opportunity cost" suffered by a cable operator when a conventional programming service is displaced in favor of a leased access user—the loss of the ability to program channels to retain and attract cable subscribers. Any leased access formula that is eventually adopted by the Commission must fully compensate cable operators for this most critical opportunity cost.

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[31] Besen/Murdoch Report (Attachment A) at 12-13.

[32] *Id.* at 19.

[33] *Id.*

C. Displacement Of Existing Programming Services Caused By Adoption Of The Proposed Formula Would Dramatically Impact Subscribers.

In an attempt to help quantify how TCI's operation, financial condition and market development would be affected by the deletion of existing programming services in favor of leased access users, TCI recently commissioned a subscriber survey in three large cable systems.[34] As shown in the Talmey-Drake Survey, the impact on subscribers is dramatic. Specifically, Talmey-Drake questioned subscribers in Washington, D.C., Denver and Seattle regarding the loss of the specific channels TCI would designate for deletion under the Commission's proposed rate formula. The Survey also noted that, based upon previous requests and TCI's economic analysis, it was likely that most of the deleted channels would be replaced by leased access services offering home shopping or infomercials. **25 percent of the surveyed subscribers indicated that they would "definitely" cancel their cable service if the designated channels were deleted.**[35] An additional 27 percent of subscribers stated they would "probably" cancel their cable service if the leased access channels replaced the existing programming services.[36] This evidences the possibility for a huge economic loss to the cable operator.

Subscribers were also asked how replacement of these existing programming services by leased access would affect the value of their cable television service. In response, **80 percent of subscribers stated that the loss of the existing channels designated for deletion**

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[34] Talmey-Drake Research and Strategy, Inc., *Leased Access Programming Issues Survey* (Apr. 1996) ("Talmey-Drake Survey") (Attachment G).

[35] *Id.* at 1.

[36] *Id.* at 4.

would either substantially lower or very substantially lower the value of their cable television service.[37] Thus, even for those subscribers who would not terminate their service, there is strong evidence of a significant reduction in the perceived value of their cable subscription.

The Talmey-Drake Survey also measured the competitive impact of leased access. Talmey-Drake asked subscribers whether, if another video programming distributor were available with the same programming services at a comparable price, the cable subscriber would switch providers if the alternative provider did not have to delete the designated programming services to make room for leased access channels. The subscriber reaction was again very damaging. **79 percent of subscribers stated that they would definitely or probably switch to the alternative provider that was not required to delete the existing programming services.**[38] The presence of DBS and MMDS competition make this question particularly relevant in the Commission's evaluation of the economic effect of a subsidized leased access rate upon cable operators.

The results of the Talmey-Drake Survey are absolutely consistent with the observations of Camille Jayne:

> Although there are many factors involved in programming decisions, if the programming, packaging and pricing are not responsive to subscribers' needs, it has a serious, negative impact on their perception of the value of our product/service. Customers simply will choose someone else. . . . Research demonstrates that niche programming services are particularly valued by customers in making purchase decisions. The ability to balance broadbased, mass audience programming with niche-oriented, diverse programming is one of the key components to

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[37] *Id.* at 3.

[38] *Id.* at 5.

> the value of the cable system's offering. The ability to program is of critical value.[39]

The Talmey-Drake Survey provides overwhelming evidence that the opportunity of a cable operator to program channels in order to **retain** cable subscribers is of critical economic importance. The survey does not, however, even include an evaluation of how many potential cable subscribers are **not added** to the cable system as a result of a loss of existing programming services. The Talmey-Drake Survey directly supports the Commission's observation, and TCI's assertion, that if an existing programming service has a negative opportunity cost, the reason it is being carried must be in order to enhance or maintain subscriber penetration.[40]

All of the above evidence leads to the inescapable conclusion that the Commission has omitted the most important economic factor in determining whether the loss of an existing programming channel to leased access will have an adverse affect on cable operations. It is critical that any leased access rate formula adopted by the Commission appropriately consider and compensate the cable operator for this opportunity cost.

III. THE COMMISSION SHOULD RETAIN THE HIGHEST IMPLICIT FEE FORMULA.

The highest implicit fee formula has proven to be a reasonable approach to the problem of arriving at a leased access price which adequately compensates the cable operator and avoids the problem of service migration. The fact that there is less leased access than the Commission might have expected is not because of shortcomings in the formula, but is the

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[39] Jayne Aff. (Attachment F) ¶¶ 4-5.

[40] *NPRM* ¶ 88.

product of economic factors inherent in the leased access concept.[41] The highest implicit fee formula is consistent in every way with Section 612, and the Commission should retain it.

The highest implicit fee formula is not without flaws. As the Besen/Murdoch Report explains, "In most instances, the formula adopted in 1992 for calculating the maximum implicit access fee that cable operators can charge to leased access programmers understates the true maximum implicit access fee that a cable operator currently realizes."[42] In other words, the leased access rate calculated by using the highest implicit fee formula is too low by some unknown, but probably quite substantial, amount.[43]

The Commission's concern that the highest implicit fee formula leads to "double counting"—collecting the per channel fee from both the subscriber and the leased access user—is misplaced. The concern erroneously assumes that cable subscribers are not affected by the programming offered on their local cable system. But that assumption does not comport with reality, as demonstrated by the Talmey-Drake Survey presented herein. The Besen/Murdoch Report points out that the "double-counting" concern "ignores the fact that leased access services render the cable operator's package less attractive to subscribers."[44]

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[41] *See* discussion in Part I(B) above.

[42] Besen/Murdoch Report (Attachment A) at 19.

[43] Although too low, the highest implicit fee formula has not resulted in the migration of existing BST and CPST service to "pay" leased access. As is explained in the Besen/Murdoch Report, presumably, this is because there are net costs of migration that offset the cost advantage programmers would enjoy if they were to migrate to leased access. *See* Besen/Murdoch Report (Attachment A) at 19-20.

[44] *Id.* at n.31.

Cable operators constantly strive to carry more and better programming as a means of enhancing subscriber satisfaction and subscriber revenue. Although difficult to quantify, there is an undisputable reduction in subscriber satisfaction when programming quality and mix declines. This reduction necessarily has an adverse impact on the ability of the operator to retain or attract subscribers and to maintain or increase monthly service rates. The "subscriber revenue" component included in the existing "highest implicit fee" formula is, therefore, not a double payment to the operator. Instead, it represents an inexact, but reasonable, surrogate for the value lost to the operator when existing channel capacity is dedicated to leased access programming, which must be assumed to have little or no appeal to cable customers. The highest implicit fee formula provides reasonable compensation to the operator for the loss of the ability to program a channel that is converted to leased access use, and the Commission should not abandon it.

IV. SECTION 612 DOES NOT GUARANTEE LEASED ACCESS USERS THE RIGHT TO BASIC OR TIER CARRIAGE.

The Commission in its *NPRM* tentatively concludes that leased access users have the right to be included in the operator's basic or expanded tiers. Neither the original language from the 1984 Cable Act nor the 1992 Cable Act amendments to Section 612 support the Commission's tentative conclusion. However, if the Commission maintains this interpretation, it must ensure that leased access users adequately compensate the cable operator for the tremendous economic benefit of "free riding" on the cable operator's established basic or expanded tiers.

A. The Plain Language Of Section 612 Does Not Guarantee Or Imply A Right Of Leased Access Carriage On Basic Or Expanded Tiers.

Nothing in the language of Section 612 requires or even implies that leased access users have a right of carriage on a cable operator's basic or expanded tiers. It is clear the 1984 Cable Act provisions establishing Section 612 created no such right. In 1984, Congress was not at all concerned with the placement of leased access users, but instead that cable operators be prohibited from exercising editorial control over leased access programming.[45] Congress easily could have required basic or tier carriage, but did not. Indeed, a logical interpretation of Section 612, as enacted by the 1984 Cable Act, is that leased access programming should **not** be commingled with the cable operator's programming services, but instead, stand or fall on its own merits.

The 1992 Cable Act specifically requires carriage of "must carry" and "retransmission consent" broadcast signals on basic service.[46] It includes a similar requirement for franchise mandated public, educational and governmental access channels.[47] In contrast, the Act is conspicuously silent on the placement of commercial leased access channels. In its original Rate Order, the Commission correctly noted that "[u]nlike core PEG channels, Congress did not mandate specific tier location for leased access and did not require

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[45] 1984 House Report at 50-51.

[46] 47 U.S.C. § 543(b)(7)(A)(i).

[47] 47 U.S.C. § 543(b)(7)(A)(ii).

that leased access be carried on basic service."[48] Nowhere in the plain language of Section 612 is a right of basic or tier carriage created for leased access users. Therefore, the legislative history upon which the Commission relies in the *NPRM* to tentatively conclude that such a carriage right exists is unpersuasive.[49] The Commission cannot rely upon legislative history to create a right that is clearly absent from the statutory provisions.[50] Further, the Commission is utilizing the 1992 legislative history to imply that such a right to basic or tier carriage existed in the original 1984 statutory provisions. However, no basic or tier carriage right is found in the original Section 612 provisions and subsequent legislative

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[48] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Report and Order*, 8 FCC Rcd. 5631, 5939 ¶ 498 (1993) ("*Report and Order*").

[49] The Commission relies upon legislative history from the 1992 Cable Act amendment to Section 612 providing that: "The FCC should ensure that these programmers are carried on channel locations that most subscribers actually use, while also considering the legitimate need of the cable operator to market its product . . . It is vital that the FCC use its authority to ensure that these channels are a genuine outlet for programmers." 1992 Senate Report at 79.

[50] *Norfolk & W. R. Co. v. American Train Dispatcher Assoc.*, 499 U.S. 117, 128 (1991) (where statutory language is "clear, broad, and unqualified," Court rejects "distinction . . . based on [a]nalysis of legislative history"); *Ex parte Collett*, 337 U.S. 55, 61 (1949) ("there is no need to refer to the legislative history where the statutory language is clear"); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947) ("There is . . . no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law."); *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945) ("The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.").

history from the 1992 Cable Act should be given little, if any, weight in interpreting the 1984 statute.[51]

If Congress had intended to create a right of carriage on basic or expanded tiers for leased access users, it clearly could have done so. Congress did not require such carriage, and the Commission is not free to create a right that so fundamentally alters the relationship between cable operators and leased access users.

B. Leased Access Users Must Compensate Cable Operators For Basic Or Tier Carriage.

If a leased access user's programming is unable to survive commercially absent carriage on a cable operator's basic or expanded tiers, there obviously exists a tremendous economic benefit from such carriage that has been conferred by the operator on the leased access user. Should the Commission adopt its tentative conclusion that leased access users have a right to basic or tier carriage, any leased access maximum rate formula must recognize and account for the significant economic value the leased access user obtains from such placement.

Economists Besen and Murdoch have reviewed the value that would be derived by a leased access user on a cable operator's basic or expanded tier. They find that:

> The creation of value by the cable operator that assembles attractive service tiers is extremely important. If, instead, all program services leased channel capacity that was passively supplied by a cable operator, program services would free-ride on the spillover benefits from other services and, consequently,

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[51] *See, e.g., Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 839-40 (1988) ("the opinion of [a] later Congress as to the meaning of a law enacted 10 years earlier does not control the issue") (citing *United Airlines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977)).

all services would underinvest in quality programming and in promotion. . . . Through its role in coordinating the contents of its service tiers and in providing diverse programming, the cable operator maximizes the value of its offerings.[52]

Because cable operators select programming for its contribution to the value of the package, carriage terms offered to a particular program service may be specifically designed to capture spillover effects of new programming on the operator's *other* program services, or enhancement of the value of the package as a whole. Besen and Murdoch observe that,

> [t]he payment by the cable operator to the service for these spillovers is reflected in a higher affiliation fee. The Commission recognizes that some programming will create significant positive benefits for other program services and for the cable operator, but it does not incorporate such benefits into its calculation of opportunity costs.[53]

The provisions of Section 612 do not expressly or by implication create a right of basic or tier carriage for leased access users. However, if the Commission confers such a right on leased access users, cable operators should not be forced to subsidize leased access carriage and should be compensated for the value of basic or expanded tier carriage.

V. THE COMMISSION SHOULD ENDORSE CABLE OPERATORS' RIGHT TO ESTABLISH DIFFERING LEASED ACCESS RATES.

Assuming the Commission establishes a compensatory leased access rate, TCI intends to attempt to negotiate below that maximum rate with certain potential leased access users. Specifically, TCI believes that educational, minority and local programming will bring more value and certainly less harm to a cable system than, for example, additional shopping

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[52] Besen/Murdoch Report (Attachment A) at 13.

[53] *Id.* at 12.

channels or infomercial services.[54] Section 612(c)(2) provides that operators "may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person."[55] The legislative history to this provision further provides:

> It is therefore appropriate for the cable operator in establishing reasonable price, terms and conditions pursuant to this section to do so on the basis of the nature of the cable service being provided.[56]

Thus, cable operators appear to have significant flexibility in negotiating leased access rates below a maximum rate, as long as such determinations are not made based upon the programming's specific editorial content.[57]

Although Section 612 already provides a general right to establish differing leased access rates based upon the content of the potential leased access programming, TCI requests that the Commission confirm and clarify this right by promulgation of a specific rule. Cable operators have been reluctant to risk the disputes that would likely arise if operators negotiate variable rates based upon the operator's perception of the harm or value brought to the system by the leased access programming.[58] The Commission should specifically confirm

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[54] *See* Talmey-Drake Report (Attachment G) at 2. Of thirteen program categories, subscribers, by wide margins, identified home shopping and infomercials as types of programming they did **not** want to see more of.

[55] Communications Act, Section 612, 47 U.S.C. § 532(c)(2).

[56] 1984 House Report at 51.

[57] *Id.*

[58] Thus, for example, when the Commission first promulgated its highest implicit fee formula in 1992, TCI concluded that it should apply that formula to all leased access

this right to negotiate differing leased access rates based on content in order to encourage cable operator negotiation below the maximum rate and to protect such operators from unnecessary Commission and court proceedings. Because Section 612 already contains a channel set-aside preference for minority and educational programming,[59] TCI believes that negotiating rates for such leased access programming below the maximum rate would be consistent both with Section 612 **and** with the operator's evaluation of the harm or benefit such programming would bring to an individual system.

TCI suggests a Commission rule recognizing the right of operators to set leased access rates below a maximum rate based upon content—and stating that such lower rates do not establish a precedent for all other potential leased access users. TCI believes that such a

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users to avoid the implication that it was favoring some users over others. Consequently, rates for leased access rose in some instances. TCI's experience with leased access users since that time has confirmed that, in seeking leverage to obtain low rates, some leased access users will accuse the operator of acting unfairly if there is a perceived difference between their leased access rates and those of another leased access user. *See, e.g., United Broadcasting Corp. d/b/a Telemiami v. TCI TKR of South Dade, Inc.*, CSC 366. After filing its original petition, Telemiami kept close watch on other leased access users in the Miami area and concluded that a leased access user providing educational programming was enjoying a preferential leased access rate. Telemiami complained to the Commission that this raised "new and serious questions of discriminatory treatment." *See Supplement to Petition for Special Relief of United Broadcasting Corp., d/b/a Telemiami, against TCI TKR of South Dade, Inc.*, CSC 366 (filed Nov. 3, 1994) at 3; *see also Second Supplement to Petition for Special Relief of United Broadcasting Corp., d/b/a Telemiami against TCI TKR of South Dade, Inc.*, CSC 366 (filed Jan. 20, 1995). If the rules explicitly recognized the operator's right to negotiate different terms with different leased access users, based on perceived harm or value of the proffered leased access programming, it would provide operators with some protection against such accusations.

[59] Communications Act, Section 612(i)(1), 47 U.S.C. § 532(i)(1).

rule would significantly encourage cable operators to establish leased access rates below the maximum level based upon the content of those services.

VI. SECTION 612 PRECLUDES MANDATORY PREFERENTIAL RATES FOR "NOT-FOR-PROFIT" ACCESS USERS.

TCI strongly supports, as described in the preceding section, the right of cable operators to establish differing leased access rates based upon the content of the proposed leased access programming. Assuming the Commission sets a compensatory leased access rate, TCI will attempt to negotiate rates below the maximum rate to encourage minority, educational and local programming. However, Section 612 does **not** allow the Commission to impose mandatory preferential rates for the category of "not-for-profit" leased access users.

The statute defines "commercial use" as "the provision of video programming, **whether or not for profit.**"[60] Further, the legislative history confirms that "commercial use" under Section 612 does not distinguish whether the "third party providing program service is a profit or nonprofit entity."[61] Thus, the plain language of the Act contemplates that profit and not-for-profit entities will be treated equally and rejects any mandatory rate preference for not-for-profit entities. The statute did create a more narrowly tailored category for educational and minority programming channel set-asides, but did not create a rate preference for not-for-profit entities. The Commission is, therefore, without statutory authority to create such a category of mandatory preferential leased access rates.

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[60] Communications Act, Section 612(b)(5), 47 U.S.C. § 532(b)(5) (emphasis added).

[61] 1984 House Report at 48.

On a policy level, the category of not-for-profit entities is grossly overbroad and highly unlikely to promote an increase in competition and diversity, or in minority, educational or local programming. The Commission should be aware that many not-for-profit entities exist not to advance any public interest purpose, but simply to serve the members of their particular association. Among the largest non-profits in this category are entities such as the American Automobile Association and the National Association of Security Dealers. Non-profits include trade associations, insurance and pension funds (the two largest non-profits in terms of annual income are the Teachers Insurance and Annuity Association of America, which exists to provide annuities, life insurance, disability and long term care insurance for its members, and the College Retirement Equities Fund, Inc., which is a pension fund). The Ku Klux Klan and a number of state militias are also examples of not-for-profit entities. Further, many of these not-for-profit entities have extremely healthy financial profiles and receive millions of dollars of revenue each year. For example, the largest non-profit organization, the Howard Hughes Medical Institute, has net worth of $8.2 billion and annual income of $423 million; the National Rifle Association has annual income of $148 million. It is obvious that such not-for-profit entities do not require preferential leased access rates and no public policy would be served in subsidizing such entities.

Perhaps more importantly, establishing preferential rates for not-for-profit entities will not ensure that the programming shown on that entity's leased access channel will in any way reflect public interest programming. If the Ku Klux Klan or the NRA were mandated discount leased access rates, it is far more likely that such not-for-profit entities would run infomercials or shopping programs as revenue sources than it is that such entities would program a channel based upon that entity's beliefs or activities. There is absolutely no public policy reason that the cable industry should be forced to subsidize leased access for the overly broad category of "not-for-profit" entities.

VII. PART-TIME LEASED ACCESS PROGRAMMING SHOULD BE SUBJECT TO STRINGENT LIMITATIONS.

A. Current Leased Access Rates For Part-Time Programming Do Not Provide Reasonable Compensation.

In reviewing the existing highest implicit fee formula, the Commission notes that the majority of cable operators have found that application of the formula to part-time carriage produces unreasonably low compensation.[62] The Commission asks whether "an entirely different method of calculating the maximum reasonable rate for part-time use would be more appropriate."[63] Such a new method of calculating part-time rates would be applied in addition to allowing cable operators to pass through to leased access users the administrative costs of administering and managing part-time leased access contracts. The Commission should prescribe a new compensatory part-time formula.

TCI submits that a different method of calculating the maximum reasonable rate for part-time use is absolutely essential, for at least two reasons:

First, the present method of calculation yields rates that are low enough to severely impact the operation and financial condition of cable operators dealing with more than a minimal amount of part-time leased access. For example, a 10,000 subscriber cable system, with a $.50 per channel implicit fee, would yield a $5,000 a month highest implicit

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[62] *NPRM* ¶ 41.

[63] *NPRM* ¶ 102.

fee charge for a full month of 24 hour-a-day leased access carriage. Prorating the monthly fee to one hour units, however, allows that same cable system to charge only $6.94 per one hour segment. Even if the system's rates are weighted to day-part times, prime time rates probably would not exceed $20.00 per one hour segment. Consequently, any part-time rates based solely on prorating the leased access rate for a full-time channel will not fairly compensate the system for the use of its time and, instead, represent a windfall to leased access users.

Second, the current formula does not compensate the operator for the costs incurred when other programming is displaced for part-time leased access users. The displacement of, for example, two hours of an existing programming service has a disproportionate impact upon the value of the **remaining** channel time available to the cable operator. The value lost by the cable operator far exceeds the proportional one-twelfth (two hours) of the programming day of that channel. As described by Madison Bond, the reduced value of that programming channel is significantly greater than the displaced time:

> Even if only several hours per day are preempted on a cable network, the resulting customer confusion significantly reduces the value of the network as a whole to the consumer. Additionally, disruption of a full-time cable network by leased access programming is exacerbated if the leased access programming is inconsistent with the programming on the cable network, or if the subscriber is offended by the programming. Although many cable networks permit part-time carriage, many cable networks would rather not be carried than be carried subject to preemption.[64]

[64] Bond Aff. (Attachment B) at ¶ 5.

It is clear that the impact of part-time carriage upon the value of a cable operator's programming substantially exceeds the current proration formula, even when such rates are weighted according to day-parts. A new part-time formula that adequately compensates the cable operator must be devised.

TCI suggests that for any leased access programming running less than 24 hours per day, the cable operator be allowed a sliding percentage increase to whatever full-time rate formula is adopted by the Commission. The percentage would increase as the amount of leased access time decreases. For example, for each hourly increment below a 24 hour programming day that the access user leases, the operator would be allowed a 10 percent increase on the maximum charge. Therefore, a leased access user programming 12 hours a day would be subject to a 120 percent increase in the maximum lease rate; a leased access user programming 8 hours a day would be subject to a 160 percent increase; and a leased access user programming only 1 hour a day would be subject to a 230 percent increase in the maximum leased access rate. Using the above example of a 10,000 subscriber system with a $.50 per channel implicit fee, the sliding scale approach would produce a leased access fee for one hour of programming of between $16 and $46, depending on day part—hardly an excessive figure and still substantially below the existing market rate for infomercials. Through implementation of such a sliding scale for part-time carriage, the Commission could ensure that cable operators are reasonably compensated for the disproportionate loss of value to their channel from part-time carriage. It could also minimize the likelihood that infomercial and other direct sales programmers use leased access provisions to circumvent the existing competitive market for commercial time.

B. Cable Operators Should Not Be Required To Devote New Channels To Part-Time Leased Access Until Existing Part-Time Channels Are Substantially Utilized.

Regardless of the rate that operators are allowed to charge part-time leased access users, the displacement of existing program services for part-time carriage poses a serious problem for operators, conventional programmers, and subscribers. Indeed, the *NPRM* correctly recognizes that there will be "circumstances in which substantially greater harm to subscribers, the operator, and the non-leased access programmer may result if the leased access request is accommodated than would result for the leased access programmer if the leased access request is not accommodated."[65] This is particularly true when the amount of programming is reduced by displacing a full-time service with part-time service.

TCI appreciates the Commission's recognition of some of the problems inherent to part-time leased access carriage, but strongly disagrees with the Commission's tentative conclusion that an eight-hour minimum of leased access programming should presumptively require the displacement of an existing programming service. Even if the leased access programming can share a channel with conventional programming, the result is confusing to subscribers (particularly if the programming is inconsistent with the surrounding content) and extremely burdensome to the programmer who is partially displaced. Although some cable networks permit part-time carriage, many would rather not be carried than be carried subject to preemption.[66] TCI submits that when a channel has been designated for part-time leased access, the operator should not be required to preempt another channel for part-time use until

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[65] *NPRM* ¶ 124.

[66] *See* Bond Aff. (Attachment B) at ¶ 5.

the first such channel is fully utilized. This would be consistent with the direction in Section 612 that cable operators should be able to continue to use otherwise unused leased access channel capacity. At the very least, cable operators should not be required to open another part-time channel until eighteen hours of programming per day is consistently in use on the existing part-time leased access channel.

VIII. REPETITIVE LEASED ACCESS PROGRAMMING SHOULD BE LIMITED.

TCI has observed that one method by which leased access users expand their "programming" time is simply to repeat a small segment of programming an unlimited number of times.[67] This would be a particularly attractive strategy for infomercial or 900 number programming services in order to avoid the payment of the part-time surcharge proposed in the preceding section.

In the legislative history to Section 612, Congress explained that: "in establishing price, terms and conditions pursuant to the section, it is appropriate for a cable operator to look to the nature . . . of the service being proposed, how it will affect the marketing of the mix of existing services being offered by the cable operator to subscribers, as well as the potential market fragmentation that might be created and any resulting impact

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[67] For example, for more than five years, "The 90s Channel" offered only two hours of original programming per week (though eventually this was increased to four hours). This programming block was then repeated over and over again to fill up the remainder of an entire channel for the rest of the week. Subscriber response to this was, understandably, exceedingly negative, particularly since much of the programming (although described as "educational" and "public interest") was perceived by subscribers to be indecent or otherwise offensive. See Denver Area Educational Telecommunication Consortium, Inc. v. Tele-Communications, Inc., et al., CSR 4595 L, *Memorandum Opinion and Order* (Oct. 31, 1995) and underlying pleadings.

that might have on subscriber or advertising revenues."[68] Congress was well aware that certain types of programming could adversely affect the system's operations and that the system should be able to gauge its rates and terms accordingly. Therefore, the 1992 Cable Act amendments to Section 612 provide the Commission with sufficient authority to impose "reasonable terms and conditions" on repetitive leased access programming. A similar concept is often employed by local franchising authorities in setting forth requirements for adding public access channels. Franchising Authorities often have the right to program additional PEG access channels, if the existing channels have been filled, provided that the existing PEG channels do not include an excessive amount of repetitive programming.[69]

TCI suggests that the Commission impose a limit on leased access users such that programming may not be repeated more than twice in a week, and that each month at least 50 percent of the total programming offered by the leased access user must be nonrepeat programming. Such a restriction would help to limit negative subscriber reaction to repetitive programming and to ensure that highly valued existing programming services are not deleted to make way for overly repetitive leased access programming. It would also necessarily help the goal underlying Section 612 of increasing program diversity.

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[68] 1984 House Report at 51.

[69] For example, in the Phoenix franchise the "trigger" for additional access channels includes usage requirements that do not allow for any repetition. Similarly, the franchise for Foster City, California, has a "trigger" that requires "non-repetitive, locally produced programming, of which at least 50% shall be locally produced."

IX. A STRICT "FIRST COME, FIRST SERVED" RULE WOULD INHIBIT NEGOTIATIONS FOR RATES BELOW THE MAXIMUM.

The Commission in its *NPRM* tentatively concludes that cable operators are required to allocate leased access channels on a "first come, first served approach" as long as leased access channel capacity is sufficient to accommodate additional leased access requests. TCI disagrees that a strict first come, first served approach will result in the most diverse use of leased access channels. If the Commission reduces leased access rates in this proceeding, a first come first served approach will be particularly troublesome. Shopping channels and infomercial channels will then be able to use all of a system's leased access capacity, allowing the cable operator no opportunity to negotiate lower rates for educational, minority and local programmers.

It is clear that Section 612 did not turn cable operators into common carrier providers. The legislative history to Section 612 specifically cautions the Commission in implementing leased access against "viewing its role as that of a traditional common carrier regulator."[70] Further, the Commission, itself, has recognized that it may be necessary to allow cable operators to "make content-neutral selections from among leased access programmers . . . in order to enable them to avoid certain situations that might 'adversely affect the operation, financial condition, or market development of the cable system.'"[71]

If protected by FCC rule, TCI would attempt to negotiate leased access rates below the Commission's maximum rate—based on the value particular leased access

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[70] 1984 House Report at 54.

[71] *NPRM* ¶ 128.

programming might bring to the cable system. Specifically, TCI anticipates negotiating rates below the maximum rate for minority, educational and local programming. To facilitate such negotiations, cable operators must have a reasonable amount of time to evaluate the type of programming to be offered by potential leased access users. Because the statute specifically allows operators to consider the content of the proposed leased access programming in establishing rates, the Commission can encourage negotiation below the maximum rate by allowing a reasonable time period for programming evaluation and rate negotiation.

TCI suggests that cable operators be given at least a six month period from the time the first leased access request is received (after the effective date of the new leased access rate rules) to evaluate all leased access requests received during that period and to negotiate the various rates for such leased access use. Further, a reasonable evaluation and negotiation period from receipt of the first request would allow operators to make reasonable decisions on leased access channel positions.

X. SECTION 612 DOES NOT CONTEMPLATE RESALE OF LEASED ACCESS CHANNELS.

The Commission seeks comment on whether to allow leased access users to resell leased access time. The statute clearly does not contemplate the resale of leased access time. The statute does require that unaffiliated entities use such channel capacity for "commercial use." Section 612(b)(5) then provides that, "[f]or the purposes of this section 'Commercial Use' means the provision of video programming whether or not for profit."[72] Therefore, the **minimal** obligation of an unaffiliated entity leasing channel capacity for

[72] 47 U.S.C. § 532(b)(5).

"commercial use" is that such use be for the "provision of video programming," and not for resale to others.

There is no indication in either the statute or the legislative history that Congress ever intended that leased access users become resellers or brokers of cable system time. The obligation on leased access users is that they provide video programming when they lease their channel. Allowing leased access users to resell cable operator time will not promote diverse programming sources, but will promote profit taking by leased access users at the expense of the cable operator.

The statute does clearly contemplate that operators be allowed to consider the content of the leased access programming in order to establish the lease rate. Congress wanted to ensure that operators had the ability to look at the "nature of the service" being proposed and how such programming would "affect the marketing and mix of the existing services being offered by the cable operator to subscribers . . ."[73] It would be impossible for operators to negotiate any rate below the maximum rate if leased access users have the opportunity to resell their leased access time. To allow resale by leased access users would essentially read out of the statute cable operators' right to consider content in establishing rates. Allowing leased access resale would also eliminate the operator's ability to prohibit or channel obscene or indecent programming as currently required by the statute. Leased access resale is not only a bad idea, it is in direct conflict with the statute.

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[73] 1984 House Report at 51.

XI. THE PROPOSED LEASED ACCESS RULES WOULD VIOLATE CABLE OPERATORS' CONSTITUTIONAL RIGHTS.

A leased access formula that is less than compensatory would violate cable operators' constitutional rights to due process and just compensation under the Fifth Amendment. Further, Section 612 of the Cable Act, and the leased access rules that implement it, unconstitutionally impair cable operators' First Amendment rights.

A. A Less Than Compensatory Formula Would Impair Cable Operators' Fifth Amendment Rights.

A compensation formula that does not completely compensate cable operators for the use of their channels would impair their Fifth Amendment rights. The takings clause of the Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. "One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Dolan v. City of Tigard,* 129 L. Ed. 2d 304, 315-16 (1994) (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)). Consequently, there must be an essential nexus between the legitimate state interest that justifies the taking (here, enhancement of diversity and competition) and the taking itself; and the extent of the taking must bear some rough proportion to the magnitude of the objective sought to be achieved. *Dolan*, 129 L. Ed. 2d at 317.

There is no legitimate state interest that justifies forced carriage of leased access at less than compensatory rates, and in fact such carriage is directly contrary to express Congressional directive. Consequently, the essential nexus between the taking and the interests that justify it is missing, and the taking is unconstitutional. *See also Lucas v. South*

Carolina Coastal Council, 505 U.S. 1003 (1992); *Nixon v. United States,* 978 F.2d 1269, 1275 (D.C. Cir. 1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

B. A Less Than Compensatory Formula Would Impair Cable Operators' Rights To Due Process And Equal Protection.

Operators are entitled to the protection of due process of law. If the Commission promulgates a leased access fee formula that does not provide just compensation, and if this burden is not imposed on other similarly situated providers of video services, it would deprive operators of equal protection in violation of the fifth amendment. *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 814-15 (D.C. Cir. 1988) (applying equal protection test more stringent than rational basis to first amendment speakers).

C. Section 612 And Implementing Regulations Impair Operators' First Amendment Rights.

By requiring cable systems to set aside a portion of their channels for leased access by independent programmers, the leased access provisions of the Cable Act and related rules, like the must-carry provisions, "regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining." *See Turner Broadcasting Sys., Inc. v FCC*, 114 S. Ct. 2445, 2456 (1994)